Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

HAROLD J. SWIFT,

Petitioner,

V.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, STATE OF TEXAS, AND JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

Whether a heightened pleading standard still applies to permit dismissal of a 42 U.S.C. § 1983 action against a government official in his individual capacity, prior to any discovery and despite fair notice of the claim.

PARTIES TO THE PROCEEDING

Petitioner

Harold J. Swift

Respondents

Texas Department of Criminal Justice,
Institutional Division

State of Texas

James A. Lynaugh,
Executive Director of the Texas Department of
Criminal Justice

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

HAROLD J. SWIFT,

Petitioner,

V.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, STATE OF TEXAS, AND JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED SATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Harold J. Swift, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

Opinions Below

The order of dismissal of the United States District Court for the Southern District of Texas -- Galveston Division and the judgment of the United States Court of Appeals for the Fifth Circuit are not reported and are reproduced in the Appendix at App. 1 - 3.

Jurisdiction

The Fifth Circuit's final judgment was rendered on December 19, 1995. This Court has jurisdiction to review the court of appeals' final judgment under 28 U.S.C. § 1254.[1]

Constitutional Provisions And Statutes Involved

This case concerns the premature dismissal of an action brought against a government official in his individual capacity under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

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[1] An almost identical question has been raised in a pending petition for certiorari. *See Reyes v. Lugo*, Docket No. 95-1041, 64 U.S.L.W. 3521 (Feb. 6, 1996) (petition filed December 27, 1995).

> action at law, suit in equity, or other proper proceeding for redress.

This case also concerns the pleading requirements of FED.R.CIV.P. 8(a), which provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Statement Of The Case

Before an opportunity to conduct meaningful discovery and despite fair notice of like claim, the district court dismissed Harold J. Swift's Section 1983 action against a government official in his individual capacity solely because of a so-called heightened pleading requirement that this Court had earlier rejected in Section 1983 actions against municipalities. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). The facts of this case are clear cut and easily reviewable.

1. On May 3, 1992, Harold J. Swift suffered a ruptured abdominal aortic aneurysm that damaged his spinal cord and left him confined to a wheelchair for the rest of his

life. Mr. Swift's complaint alleged that his injuries were the direct result of the deliberately indifferent policies of prison officials who afforded him inadequate medical care.[2]

2. Mr. Swift alleged that on the morning of May 1, 1992, while he was confined in the Jester III unit in Richmond, Texas, he began to experience stomach pains. Following prison policy, he requested medical treatment at the Ramsey I unit infirmary. Rather than being provided medical treatment as requested, Mr. Swift was returned to his cell. On May 3, 1992, at approximately 7:00 a.m., Mr. Swift's pain worsened. He again requested treatment at the infirmary, but he was again returned to his cell. By 7:30 a.m., Mr. Swift's pain was so severe that he was taken from his cell on a stretcher. He remained in the prison infirmary all day without adequate treatment until he was near death.

3. On May 3, 1992, at 5:00 p.m., two days after he first notified prison officials of his illness, Mr. Swift was finally taken to Jon Sealy Hospital in Galveston, Texas, where he received the medical treatment which had been denied him by the prison officials. This medical treatment came too late. As a direct result of the deliberate indifference of prison officials, Mr. Swift is now confined to a wheelchair for the remainder of his life.

4. On May 3, 1993, Mr. Swift filed a Section 1983 complaint against the State of Texas, the Texas Department of Criminal Justice, Institutional Division, and James A. Lynaugh, Executive Director of the Texas Department of Criminal

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[2] Mr. Swift's complaint is reproduced in the Appendix, at App. 4 - 10.

Justice, in his official and individual capacities. Mr. Swift alleged, in part, that his injuries were caused by the deliberately indifferent policies of Mr. Lynaugh, which resulted in a denial of basic medical care.[3]

5. The defendants answered this complaint on July 27, 1993. The State and the Department asserted Eleventh Amendment and sovereign immunity defenses while Mr. Lynaugh asserted a qualified immunity defense.

6. On September 16, 1993, the defendants moved to dismiss Mr. Swift's complaint based on lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.[4] On October 6, 1993, Mr. Swift timely responded to the motions to dismiss.

7. On November 4, 1993, the magistrate entered a report and recommendation to dismiss all claims alleged by Mr. Swift. Specifically, the report recommended dismissal of Mr. Swift's Section 1983 individual capacity claims against Mr. Lynaugh based upon failure to state a claim upon which relief can be granted. App. 13. On November 14, 1993, Mr. Swift filed his objections to magistrate's report and recommendations, which objections were limited to his claims against Mr. Lynaugh in his individual capacity.

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[3] The denial of basic medical care to a prisoner violates the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

[4] Two weeks before the motions to dismiss were filed, the district court ordered limited discovery on the immunity issues. However, the case was dismissed on the pleadings before such discovery could occur. *See* Magistrate's Order, App. 11.

8. The district court adopted the magistrate's recommendations and entered final judgment of dismissal of the complaint on November 22, 1994. The Fifth Circuit affirmed the district court's dismissal without an opinion on December 19, 1995. This petition followed.

Reasons For Granting The Writ

A little over two years ago, this Court rejected the sort of judge-made heightened pleading requirement that the courts below applied to dismiss Mr. Swift's claims on the pleadings. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). Although that case was limited on its facts to Section 1983 claims against municipalities, the *Leatherman* rationale was too strong to be ignored by courts and litigants. This Court reasoned that a judge-made heightened pleading standard is "impossible to square" with the liberal notice pleading standard provided by the federal rules. *Id.* at 168; *see also* FED.R.CIV.P. 8(a).

The present case is important because the courts of appeals *have ignored* the *Leatherman* rationale in Section 1983 actions brought against goverment officials in their individual capacities. Throughout the country -- despite the liberal pleading rules, despite the rationale of *Leatherman*, and without discovery -- the courts of appeals continue to adhere to a heightened pleading standard to dismiss valid claims.

The message in *Leatherman* was simple and direct. A plaintiff should not be required to plead detailed facts unless those facts "are known to the plaintiff and are not peculiarly within the knowledge of the defendants." *See Schultea v. Wood*, 47 F.3d 1427, 1432 (5th Cir. 1995) (en banc) (explaining Justice Scalia's opinion in *Anderson v. Creighton*, 483 U.S.

635, 646 n. 6 (1987)). This message has particular significance in individual capacity Section 1983 actions, since such actions involve the policies and procedures of the government official -- facts that may not be known at the time of suit by the plaintiff but that which are peculiarly within the knowledge of the government official.

And the *Leatherman* rule makes good sense. A plaintiff should not be required to plead detailed facts concerning a goverment official's liability before that plaintiff has had an opportunity to discover the facts supporting liability. In light of Rule 8's liberal notice pleading requirements, courts should not dismiss on the pleadings for failure to state a claim, but "must rely on summary judgment and control of discovery to weed out unmeritorious claims...." *Id.* at 168-169.

Although the message in *Leatherman* was simple and direct, lower courts have not gotten the message. This case presents this Court with a significant opportunity to correct the apparent conflict among the courts of appeals and between the courts of appeals and this Court's reasoning in *Leatherman*, and also to provide further guidance to the lower courts concerning federal pleading requirements.

I. The Fifth Circuit's Heightened Pleading Standard For Individual Capacity Section 1983 Actions Conflicts With This Court's Reasoning In *Leatherman*

In this case, the Fifth Circuit affirmed a dismissal of an individual capacity Section 1983 action based solely upon a judge-made heightened pleading standard. App. 2. Before discovery, the district court dismissed the claim for failure to state a claim upon which relief could be granted. App. 1.

In 1993, this Court unanimously rejected such a judge-made heightened pleading requirement in Section 1983 actions brought against municipalities. *Leatherman*, 507 U.S. at 164. The Court rejected the contention that a heightened pleading standard was required to protect the governmental entity's immunity. *Id.* at 166. This Court held that a heightened pleading standard was contrary to the federal rules which require only a "short and plain statement of the claim...." *Id.* at 168; FED.R.CIV.P. 8(a). This Court reversed a dismissal, as here, based solely upon a heightened pleading standard. *Id.* at 164.

Nonetheless, as is demonstrated in this case, the Fifth Circuit continues to embrace the judge-made heightened pleading requirements in Section 1983 actions. In doing so, the Fifth Circuit has ignored this Court's unanimous reasoning in *Leatherman* and has instead held that *Leatherman* is limited to Section 1983 actions against municipalities. *See Schultea v. Wood*, 47 F.3d at 1429-30. Thus, the Fifth Circuit continues to dismiss cases based upon the same heightened pleading requirement that this Court criticized in *Leatherman*.

The Fifth Circuit is not alone in this determination. *See e.g. Branch v. Tunnell*, 14 F.3d 449, 451 (9th Cir.), *cert. denied*, 114 S.Ct. 2704 (1994) (prior decisions requiring heightened pleading standard in qualified immunity cases followed because *Leatherman* court expressly stated it was not deciding whether federal courts may employ heightened pleading standard in such cases); *Kimberlin v. Quinlan*, 6 F.3d 789, 794-795 (D.C. Cir. 1993), *reh'g en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994), *vacated on other grounds*, 115 S.Ct. 2552 (1995) (because *Leatherman* did not address heightened pleading in individual capacity suits, precedent requiring that standard remains law of circuit); *Verney v. Pennsylvania Turnpike*

Comm'n, 881 F.Supp. 145, 150 n.5 (E.D. Pa. 1995) (noting conflicting decisions within Eastern District of Pennsylvania on whether heightened pleading standard applies in any civil rights actions, including suits against individual governmental officials).

One commentator has noted that despite the clear rationale of *Leatherman*, the courts of appeals have shown a remarkable "tenacity" in adhering to the heightened pleading standard and in "refusing to extend the rationale of the decision beyond its facts." *See* Karen M. Blum, *Heightened Pleading: Is There Life After Leatherman?*, 44 CATH. U.L. REV. 59, 62 (1994).

Such tenacity, in this context, is not admirable. This Court in *Leatherman* provided a clear analytical framework for resolution of pleading challenges. That analytical framework comports with the federal rules and with the proper standard of review.[5] To ignore that analytical framework and to tenaciously cling to a judge-made rule that is without logical foundation is better described as intransigence.

The confusion among the Circuits concerning whether a heightened pleading standard has any remaining vitality in Section 1983 actions is apparent. It has been recognized that the rationale in *Leatherman* "casts doubt on the validity of *any* judge-made 'heightened pleading' standard imposed in *any* context." *Kimberlin v. Quinlan*, 6 F.3d at 799 n.5 (Edwards, J. dissenting). Moreover, the Seventh Circuit, contrary to the

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[5] As has been long established, a pleading should not be dismissed under Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Fifth Circuit, has rejected heightened pleading requirements. *See Triad Assoc., Inc. v. Robinson*, 10 F.3d 492, 497 (7th Cir. 1993). As Judge Posner of that court stated recently: "a nascent movement in the lower courts to add judge-made exceptions to those listed in Rule 9(b)...was scotched by the Supreme Court in *Leatherman.*" *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994).

Because of the confusion among the Circuits over the remaining vitality of the so-called heightened pleading standard after *Leatherman* and the national importance of this issue to all Section 1983 litigants, this Court should grant this petition.

II. Mr. Swift Satisfied The Fair Notice Pleading Standards of Rule 8(a)

This is an appropriate case for review of the continuing heightened pleading quandary because Harold J. Swift's complaint, on its face, satisfied the fair notice pleading standards of Rule 8(a). *See* FED.R.CIV.P. 8(a). That complaint is reproduced in the Appendix, at App. 4 - 10.

In this context, this Court has held that "deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). The prisoner must allege acts or omissions sufficiently harmful to demonstrate deliberate indifference to serious medical needs. *Id.* at 106.

Here, Mr. Swift alleged such "sufficiently harmful" acts or omissions. Mr. Swift alleged that dispute his repeated complaints of serious illness, he was denied basic medical care by prison officials for two days and then, after being brought to the infirmary in intense pain, he was left untreated for over nine

hours before any treatment was provided. This denial of basic medical care, Mr. Swift alleged, resulted from a policy of deliberate indifference by prison officials and resulted in a ruptured abdominal aortic aneurysm that left him confined to a wheelchair for life. *See* App. 4 - 10.[6] Mr. Swift properly alleged the violation of the Eight Amendment as the basis for his Section 1983 action. *See Estelle*, 429 U.S. at 102.

Thus, Mr. Swift's complaint provided "a short and plain statement of the claim showing the pleader is entitled to relief," as required by FED.R.CIV.P. 8(a). Since the complaint satisfied the notice pleading requirements, the complaint should not have been dismissed on the pleadings under FED.R.CIV.P. 12(b)(6). Instead, the lower court should have awaited to resolve the case upon summary judgment or trial after an adequate period for discovery had elapsed. *See Leatherman*, 507 U.S. at 168-169.

Because, as here, the lower courts continue to apply a heightened pleading requirement that is contrary to federal pleading rules and this Court's rationale in *Leatherman*, this Court should grant this petition to provide clear guidance to the lower courts on this question.

Conclusion

The petition should be granted and upon review, this Court should issue writ to reverse the lower court's order of dismissal and remand for further proceedings. In the

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[6] In his answer and motion to dismiss, Mr. Lynaugh did not allege that the defendants provided any medical treatment to Mr. Swift. Rather, Mr. Lynaugh contended that Mr. Swift's complaint sounded in negligence -- despite the fact that Mr. Swift never alleged negligent treatment.

alternative, the petition should be granted and the decision below summarily reversed and remanded to the Fifth Circuit for reconsideration in light of this Court's rationale in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

Respectfully submitted,

Harold J. Swift, Petitioner

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

HAROLD J. SWIFT	§	
	§	
VS.	§	CIVIL NO. G-93-220
	§	
TEXAS DEPARTMENT OF	§	
CRIMINAL JUSTICE -	§	
INSTITUTIONAL	§	
DIVISION, ET AL.	§	

FINAL JUDGMENT

Pursuant to this Court's Order of Dismissal, entered on even date herewith, it is the judgment of this Court that this cause be, and it is hereby, **DISMISSED**, with prejudice, in its entirety.

THIS IS A FINAL JUDGMENT.

DONE at Galveston, Texas, this _____ day of _____ _____, 1994.

_____

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60859
Conference Calendar

HAROLD SWIFT,

Plaintiff-Appellant,

versus

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL.,

Defendants-Appellees.

- - - - - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-G-93-220

- - - - - - - - - - - - - - - - - -

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:[1]

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[1] Local Rule 47.5.1 provides: "The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellant appeals from the district court's order dismissing his civil rights complaint brought pursuant to 42 U.S.C. § 1983. He argues that he was denied adequate medical treatment due to the policies implemented and enforced by appellee, Lynaugh. We have reviewed the record, the magistrate judge's report and recommendation, and the district court's order, and find no reversible error. Accordingly, we affirm for essentially the reasons given by the district court. Swift v. Texas Dep't of Criminal Justice, Institutional Division et al., No. CA-G-93-220 (S.D. Tex. Nov. 22, 1994).

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

HAROLD J. SWIFT	§	
	§	
VS.	§	
	§	
TEXAS DEPARTMENT OF	§	CIVIL ACTION NO. ___
CRIMINAL JUSTICE,	§	
INSTITUTIONAL	§	
DIVISION; STATE OF	§	
TEXAS; JAMES A.	§	
LYNAUGH, EXECUTIVE	§	
DIRECTOR OF THE	§	
TEXAS DEPARTMENT	§	
OF CRIMINAL JUSTICE	§	

ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE AND JURY OF SAID COURT:

COMES NOW HAROLD J. SWIFT ("Plaintiff" or "Swift") and files this Original Complaint pursuant to 42 U.S.C.A. § 1983 against the TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION; THE STATE OF TEXAS; and JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE (collectively referred to as "Defendants"), and for cause of action would show this Court as follows:

I.

PARTIES

1.1 HAROLD J. SWIFT, Plaintiff, is a resident of Texas under the care and custody of Defendants. Swift is currently confined at the Jester III unit in Richmond, Texas.

1.2 THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE may be served with citation and process in this matter by delivery of a copy of this petition and citation to the Texas Department of Criminal Justice, P.O. Box 99, Huntsville, Texas 77342-0099 or at 815 Eleventh Street, Huntsville, Texas 77340.

1.3 THE STATE OF TEXAS may be served by service of a copy of this petition and citation upon Attorney General Dan Morales at P.O. Box 12548, Austin, Texas 78711.

1.4 Defendant JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, may be served by service of a copy of this petition to James A. Lynaugh, Executive Director, Texas Department of Criminal Justice, P.O. Box 99, Huntsville, Texas 77342-0099.

II.

JURISDICTION AND VENUE

2.1 Your Plaintiff would show that venue and jurisdiction in this Court is proper under the laws and

constitution of the United States, including 28 U.S.C. § 1343 and 28 U.S.C. § 1391(b).

III.

DEFENDANTS' LIABILITY

3.1 When Plaintiff Swift alleges herein that Defendants did or failed to do any act or omission leading to liability to Plaintiff, it is intended to allege that Defendants, acting through their employees, agents, and/or servants, under the policies, regulations, customs, and usages established and implemented by Defendants, caused harm and violated the rights, privileges, or immunities secured by the Constitution and laws of the United States.

IV.

BASIS FOR LIABILITY

4.1 Defendants TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION; THE STATE OF TEXAS; and JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, were entrusted with the care and custody of Plaintiff Swift while he was incarcerated in the Texas Department of Corrections. On or about May 1, 1992, while incarcerated at Ramsey I Unit in Rosharon, Texas, Plaintiff Swift began experiencing severe stomach and back pains. Pursuant to the rules and regulations of Defendants, Plaintiff Swift presented for medical care to the infirmary at Ramsey I Unit on May 2, 1992 at 7:30 a.m. and requested treatment for his urgent medical needs. However, despite the

urgent right to necessary medical care which every incarcerated person is entitled to under the rights, privileges, and immunities secured by the Constitution and laws of the United States, Plaintiff Swift was returned to his cell by the employees at Ramsey I Unit operating under the regulations, customs, and usages laid down by Defendants. The sum effect of these regulations, customs, and usages is to deny necessary medical care to inmates such as Swift, and the continuing practice of Defendants is to be deliberately indifferent to this continuing denial of necessary medical care.

4.2 The failure to render necessary and critical medical care, including reasonable examination and care for his extremely urgent condition, was under the color of the regulations, customs, procedures and practices of the State of Texas and the Texas Department of Criminal Justice, intentional and deliberately established by Defendant James A. Lynaugh as Executive Director of the Texas Department of Criminal Justice. Defendants established and have implanted rules, customs, and procedures that intentionally deprive inmates such as Swift of critically necessary medical care. Because of Defendants' deprivation of the rights, privileges, or immunities secured by Constitution and laws of the United States to Swift, Swift's condition continued to deteriorate.

4.3 Swift again presented himself to sick call at 7:00 a.m. on May 3, 1992 and pleaded for the basic medical care which the customs, usages, and policies of the State of Texas and the Texas Department of Criminal Justice denied him. However, Plaintiff Swift was again refused necessary medical care, despite his increasingly critical medical condition, and he was returned to his cell once again. By 7:30 a.m. on or about May 3, 1992, the pain and symptoms of Plaintiff Swift's rapidly

deteriorating physical condition so worsened that he was removed from his cell to the infirmary at Ramsey I Unit by stretcher.

4.3 Following the guidelines, rules, customs, procedures and regulations of the State of Texas and the Texas Department of Criminal Justice, the infirmary employees intentionally and deliberately refused to transfer Plaintiff Swift to obtain what became absolutely necessary medical examination and treatment. This custom, policy and procedure of denial of necessary medical care was established under color of the customs, usage, and practices of the State of Texas and the Texas Department of Criminal Justice, and these customs, policies, and procedures deprived Plaintiff Swift of the rights, privileges, and immunities guaranteed by the Constitution and laws of the United States.

4.4 Plaintiff Swift's condition continued to worsen until it finally appeared by 5:00 p.m. on May 3, 1992 that he was near death. The policy and procedures of the Texas Department of Criminal Justice and the State of Texas, deliberately established and implemented by James A. Lynaugh, Executive Director of the Texas Department of Criminal Justice, meant that despite the urgent need for immediate critical medical care, Swift's condition was allowed to deteriorate until he was finally life flighted to John Sealy Hospital in Galveston, Texas. Upon arrival in critical condition, Plaintiff Swift was provided the medical care which had been so callously and completely denied him for two days under the color of the statutes, customs, policies, and procedures of the Texas Department of Criminal Justice and the State of Texas. By that time, however, the ruptured abdominal

aortic aneurysm which could have been repaired in time had led to spinal cord damage which permanently crippled Swift.

4.5 Due to the deliberate indifference to the serious medical needs of Swift under the custom, policy, and procedures of the State of Texas and the Texas Department of Criminal Justice, Swift is now confined to a wheelchair for the rest of his life. In addition, Swift continues to suffer from a neurogenic bowel and bladder condition and severe mental and physical pain and torment for the rest of his natural life.

4.6 Defendants may have had the right to confine Swift to the prisons of Texas, but Defendants did not have the right through their policies, procedures, and customs, to confine Swift to a wheelchair for the rest of his life. Due to the deliberate indifference to the serious medical needs of Swift by Defendants, a natural byproduct of the rules, customs, procedures and regulations of Defendants, Plaintiff Swift has been robbed of all that he might ever hope to return to after his life in the care and custody of Defendants.

V.

DAMAGES

5.1 Due to the deliberate and intentional implementation of policies and procedures whereby inmates such as Swift are denied basic necessary medical aid, Swift will be forced to serve his time in the prisons of the State of Texas and thereafter in a wheelchair. Swift has been robbed of his ability to earn a living after he satisfies the requirements of the State of Texas, he has been forced to endure unimaginable pain and metal anguish, and he will continue to require expensive

and painful medical care for the rest of his now-shortened life. For all these damages and more, Plaintiff Swift now makes claim in this Court.

WHEREFORE, PREMISES CONSIDERED, your Plaintiff HAROLD J. SWIFT prays that Defendants be cited to appear and answer herein, and that upon final trial and hearing hereof, Plaintiff recover his damages pursuant to 42 U.S.C. Section 1983, as well as such other claims allowed to him, and for such other and further relief, general and special, legal and equitable, to which he may show himself justly entitled.

Respectfully submitted,

SPAGNOLETTI & ASSOCIATES

_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

HAROLD J. SWIFT	§	
	§	
VS.	§	CIVIL NO. G-93-220
	§	
TEXAS DEPARTMENT	§	
OF CRIMINAL JUSTICE -	§	
INSTITUTIONAL	§	
DIVISION, ET AL.	§	

ORDER OF ADOPTION

Before the Court is the Report and Recommendation of the United States Magistrate Judge dated November 14, 1994, to which Plaintiff has filed objections. This Court has given this matter the de novo review contemplated by 28 U.S.C. § 636(b)(1)(C) and finds the Report and Recommendation of the Magistrate Judge to be a well reasoned analysis of why this unfortunate occurrence cannot give rise to a constitutionally cognizable cause of action. Plaintiff's objections are without merit and the Report and Recommendation of the Magistrate Judge is hereby **ADOPTED** in its entirety.

For the foregoing reasons set forth in the Report and Recommendation of the Magistrate Judge it is the **ORDER** of this Court that Plaintiff's complaint is **DISMISSED** in its entirety.

DONE at Galveston, Texas, this _____ day of _____ _____, 1994.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

HAROLD J. SWIFT	§	
	§	
VS.	§	CIVIL ACTION
TEXAS DEPARTMENT OF	§	NO. G-93-220
CRIMINAL JUSTICE-	§	
INSTITUTIONAL	§	
DIVISION, ET AL.	§	

REPORT AND RECOMMENDATION

Before the Court for its Report and recommendation is Defendants' Motion to Dismiss. Plaintiff has filed a response to the motion, and this matter is ripe for the Court's consideration. Having given this matter thorough review, the Court submits the following report and recommendation to the District Court.

Relevant Background

On May 3, 1993, Plaintiff brought this action against Defendants the Texas Department of Criminal Justice - Institutional Division, hereinafter "TDCJ-ID"; the State of Texas; and James A. Lynaugh, Executive Director of the TDCJ. Plaintiff alleges that he was subjected to deliberate indifference to his serious medical needs through the action or inaction of the agents, employees and servants of Defendants in carrying out the policies, procedures, and customs established by Defendants.

The facts are fairly simple. On May 2, 1992, Plaintiff presented to the Ramsey I unit infirmary at 7:30 a.m. and sought treatment for severe stomach and back pains he had begun to experience a day earlier. According to Plaintiff, he was returned to his cell without receiving a "reasonable examination", which, he concludes, constituted deliberate indifference to his serious medical needs. The next day at 7:00 a.m., Plaintiff once again reported to the infirmary and was once again returned to his cell without receiving the medical care he needed. His condition so worsened in the ensuing half hour that at 7:30 a.m. he was taken to the infirmary on a stretcher. Plaintiff alleges that he was further subjected to deliberate indifference to his serious medical needs because it was not until 5:00 p.m. that same day that he was transferred, by life-flight, to John Sealy Hospital where he arrived in critical condition. At the hospital, Plaintiff was provided the necessary medical care, but by this time the ruptured abdominal aneurysm had damaged his spinal cord, leaving Plaintiff permanently crippled and confined to a wheelchair. Plaintiff also continues to suffer from a neurogenic bowel and bladder condition as well as severe mental and physical pain.

Plaintiff avers that while Defendants may have had the right to confine him to a Texas prison, they did not have the right, through their customs, policies, and procedures, to confine him to a wheelchair for the rest of his life.

Analysis

Defendants have filed a Motion to Dismiss pursuant to Rule 12(b) (1) and Rule 12(b) (6) of the Federal Rules of Civil Procedure. In the motion, Defendants assert their entitlement to Eleventh Amendment immunity, sovereign immunity, and

qualified immunity, as well as the inapplicability of respondeat superior and negligence principles to 42 U.S.C. § 1983 actions.

A review of the complaint reveals that Plaintiff has sued two state entities and has phrased much of the pleading in negligence terms. In the Response to the Motion to Dismiss, Plaintiff essentially concedes the legitimacy of Defendants' arguments in support of dismissal with the exception of the claims stated against Defendant Lynaugh in his individual capacity stemming from his direct involvement in establishing, implementing, and enforcing policies for the evaluation of inmates' medical needs that resulted in the deprivation of necessary medical care. Therefore, this Court **RECOMMENDS** that the claims for damages against the state entities, TDCJ-ID and the State of Texas, as well as any official capacity claims against Defendant Lynaugh be **DISMISSED** under rule 12(b) (1) for lack of jurisdiction as they are barred by the Eleventh Amendment, absent congressional abrogation or waiver by the state. Kentucky v. Graham, 473 U.S. 159, 169 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984); Hirtz v. State of Texas, 974 F.2d 663 (5th Cir. 1992).

Plaintiff's complaint is not at all specific about the nature of the policies or customs emanating directly from Defendant Lynaugh that led to the alleged deprivation of his right to be free from deliberate indifference to his serious medical needs.[1] Specificity in pleading is of the essence in an

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[1] In the Response to the Motion to Dismiss, Plaintiff alludes to Defendant Lynaugh's direct involvement in establishing policies, etc., for evaluating inmates' medical needs that deprive inmates such as Plaintiff of "necessary medical care". This is not the correct standard under the Eighth

action filed under 42 U.S.C. § 1983 where an individual defendant has asserted qualified immunity. Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985); Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1994); Jordan by Jordan v. Jackson, 15 F.3d 333, 339 n.5 (4th Cir. 1994). An individual defendant is entitled to specific recitals demonstrating his personal involvement in the alleged wrongs perpetrated against the plaintiff. Lynch v. Cannatella, 810 F.2d 1363, 1377 (5th Cir. 1987). Plaintiff's complaint is laden with the sort of conclusory allegations that are anathema in section 1983 actions. See Jacquez v. Procunier, 801 F.2d 789 (5th Cir. 1986). For this reason, this Court must **RECOMMEND** that Defendants' Motion to Dismiss be **GRANTED** under Rule 12(b) (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Although respondeat superior does not apply in actions filed pursuant to 42 U.S.C. § 1983, Monell v. New York Dep't of Soc. Servs., 436 U.S.658, 693 (1978), one approach to holding an individual in Defendant Lynaugh's position liable is through the concept of supervisory liability. Supervisory liability exists even without overt personal participation in the offensive act if the supervisory official implements a policy so deficient that the policy "itself is a repudiation of constitutional right" and is "the moving force of the constitutional violation". Grandstaff v. Borger, 767 F.2d 161, 169, 170 (5th Cir. 1985), reh'g en banc denied, 779 F.2d 1129 (5th Cir. 1986), cert. denied, 480 U.S. 916 (1987), as quoted in Thompkins v. Belt, 828 F.2d 298, 304 (5h Cir. 1987). A supervisory official such as Defendant Lynaugh cannot be held liable unless he knew the prison's medical care system was so deficient as to expose

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Amendment.

prisoners to deliberate indifference to their serious medical needs, he failed to properly correct the deficiencies, and his action or inaction caused Plaintiff's injuries. Thompkins v. Belt, at id. It is axiomatic that a constitutionally deficient policy cannot be inferred from a single wrongful act. Id. None of the above elements has been pleaded in this case, certainly not with the specificity required in a case of this nature, which provides another reason for this Court to **RECOMMEND** that this action be **DISMISSED** for failure to state a claim under Rule 12(b) (6) of the Federal Rules of Civil Procedure.

This Court also agrees with Defendants that despite peppering the allegations in the complaint with the buzzwords of "deliberate indifference", the complaint, when reduced to its simplest terms, alleges nothing more than negligence, which is not actionable under 42 U.S.C. § 1983. Daniels v. Williams, 474 U.S. 327 (1986). Medical malpractice is not alchemized into a constitutional claim simply because Plaintiff happens to be a prisoner. Estelle v. Gamble, 429 U.S. 97 (1976). It is also axiomatic that evidence of examination and treatment negate deliberate indifference. Bass v. Sullivan, 550 F.2d 229 (5th Cir.), cert. denied, 434 U.S. 864 (1977). Plaintiff's own pleading acknowledges that he was seen by prison infirmary personnel and ultimately transported to John Sealy Hospital. While Plaintiff might disagree with the course of treatment he received, such disagreement, even where warranted, as in this extremely unfortunate case, does not amount to a constitutional claim. Wesson v. Oglesby, 910 F.2d 278, 284 (5th Cir. 1990). This kind of pleading deficiency is yet another reason this Court **RECOMMENDS** Defendants' Motion to Dismiss be **GRANTED**.

In passing, this Court feels compelled to note that at no

time during the pendency of the motion to dismiss did Plaintiff move for leave to amend to name more culpable defendants or to cure the deficiencies in pleading.

The Clerk shall send copies of this Report and Recommendation to the parties who have ten (10) days from receipt thereof to file written objections thereto, pursuant to General Order 80-5. Failure to file written objections within the prescribed time shall bar an aggrieved party from attacking the factual findings on appeal.

DONE at Galveston, Texas, this the 3rd day of November, 1994.

JOHN R. FROESCHNER
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
JUN 7 1996
CLERK

(2)

NO. 95-1488

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

HAROLD J. SWIFT

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, STATE OF TEXAS, AND JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Respondents,

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a heightened pleading standard still applies to permit dismissal of a 42 U.S.C. § 1983 action against a government official in his individual capacity.

PARTIES TO THE PROCEEDING

Petitioner

Harold J. Swift

Respondents

Texas Department of Criminal Justice
Institutional Division

State of Texas

James A. Lynaugh,
Executive Director of the Texas Department of Criminal Justice

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Respondents,

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the Texas Department of Criminal Justice. Institutional Division, State of Texas, and James A. Lynaugh, Executive Director of the Texas Department of Criminal Justice, Petitioners herein, by and through the Attorney General of Texas, and file this Petition in Opposition.

Statement Of The Case

On May 3, 1993, Petitioner, hereinafter "Swift," initiated this lawsuit by filing a complaint in the United States District Court for the Southern District of Texas, Galveston Division. Pet. App. 4-10. Swift brought his action against the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), the State of Texas, and James Lynaugh (Lynaugh), the former Executive Director of the Texas Department of Criminal Justice, pursuant to 42 U.S.C. § 1983, and seeking money damages for alleged violations of the Eighth Amendment.[1]

Specifically Swift alleged that on or about May 2, 1992 and May 3, 1992, unnamed officials at a Texas penitentiary infirmary were deliberately indifferent to his serious medical needs as the result of unspecified policies and customs for the evaluation of inmates' medical needs, that were allegedly instituted and enforced by Lynaugh. Pet App. 5-9. A scheduling conference was held on September 2, 1993, at which time the deadline for discovery on immunity issues was set for October 15, 1993, and the deadline for the filing of dispositive motions was set for October 29, 1993. On September 16, 1993, TDCJ-ID, the State of Texas and Lynaugh filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6). Swift responded to this motion on October 6, 1993. Although Swift contended that dismissal was improper as to Lynaugh in his individual capacity, he did acknowledge that dismissal was proper as to Lynaugh in his official capacity, the State of Texas and TDCJ-ID. No discovery requests were ever made.

On November 4, 1993, Magistrate Judge John R. Froeschner issued a Report and Recommendation that the motion to dismiss

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[1] Lynaugh was the Executive Director of the Texas Department of Corrections from 1987 until it was renamed the Texas Department of Criminal Justice in 1991. Lynaugh continued as the Executive Director of the renamed agency until 1993.

be granted and that all claims be dismissed. Pet. App. 13-18. At no time did Swift request leave of court to file an amended complaint. On November 22, 1994, after a *de novo* review, the district judge adopted the report and recommendation of the magistrate judge and dismissed the case. Pet. App. 1. Swift timely appealed, and the Fifth Circuit affirmed the district court's dismissal without an opinion on December 19, 1995. Pet. App. 2-3. Swift subsequently filed his petition for writ of certiorari.

Summary Of The Argument

Swift argues that the decision rendered by the Court of Appeals for the Fifth Circuit in *Schultea v. Wood*, 47 F.3d 1427 (1995) (en banc) ignores the holding of *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). However, this is not the proper case for consideration of this issue. Swift's case was dismissed not as the result of a "heightened pleading standard," but because even if Swift had conducted discovery, he could never had amended his allegations to prove any set of facts which would demonstrate more than mere negligence in the provision of medical care to him. Thus, Smith would not have been able to demonstrate a constitutional violation, because negligence "does not state a valid claim of medical mistreatment under the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 98, 105-06 (1977).

Moreover, Swift is in error regarding the holding of *Leatherman*, which is applicable only in civil rights cases alleging municipal liability under 42 U.S.C. § 1983. This Court expressly reserved the issue of whether the qualified immunity doctrine requires a heightened pleading in cases involving individual government officials. *Leatherman*, 507 U.S. at 166-67. Additionally, although this Court noted that "[w]e think it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit *in this case* with the liberal system of 'notice pleading' set up by the Federal Rules," *Id.* 507 U.S. at 168 (emphasis added), Swift is mistaken in his belief that this Court intended to extend this sentiment to fact situations other than

that which was presented in *Leatherman*. Finally, even assuming, *arguendo*, that Swift is correct, the Fifth Circuit through its decision in *Schultea* was able to avoid any substantial conflict between "the substantive right of qualified immunity" and the Federal Rules of Civil Procedure. *Schultea*, 47 F.3d at 1433, 1434.

Argument

I. The Dismissal Of Swift's Suit Was Proper

This Court need not consider the question presented by Swift because, even if all the allegations stated in Swift's complaint are taken as true, the lower court's dismissal was proper. *Estelle v. Gamble*, 429 U.S. at 99, citing *Cooper v. Pate*, 378 U.S. 546 (1964). Swift insists that the lower court should have waited to resolve the case upon summary judgment or trial after an adequate period for discovery had elapsed. Brief at 11. However, this contention contradicts the requirement of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny that, until the threshold immunity question is resolved, no discovery should be allowed. *Seigert v. Gilley*, 500 U.S. 226, 231 (1991). Moreover, this argument is without merit because Swift could not have amended his allegations to prove any set of facts in support of his claim that he had suffered a constitutional violation by defendant Lynaugh, Executive Director of the prison system.

The facts of this case are strikingly similar to those presented in *Estelle v. Gamble*, which has been the applicable legal standard for twenty years in claims involving allegations of deliberate indifference to serious medical needs of prisoners. *See Farmer v. Brennan*, 114 S. Ct. 1970, 1978 (1994). Gamble filed a § 1983 action complaining of allegedly improper medical treatment he had received for a period of approximately two months following a back injury. *Estelle*, 429 U.S at 98-101. He named the Director of the Department of Corrections, the warden of his unit and the chief medical officer of the prison

hospital as defendants. *Id.* The lower court dismissed his complaint *sua sponte* for failure to state a claim upon which relief could be granted. *Id.* In deciding whether the defendants had shown deliberate indifference to a serious medical need of Gamble, this Court held that "an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or be 'repugnant to the conscience of mankind.' Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Id*, 429 U.S. at 105-06. Gamble contended that the defendants should have pursued other methods of diagnosis. However, this Court found that such an argument "is a classic example of a matter of medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court under the Texas Tort Claims Act." *Id.*, 429 U.S. at 107.

Finding that the appellate court should have affirmed the district court's dismissal of the case as to the chief medical officer, this Court remanded the case back to the Fifth Circuit to allow it an opportunity to consider whether a cause of action had been stated against the remaining prison officials. *Id.*, 429 U.S. at 108. On remand, the Fifth Circuit concluded that Gamble had failed to state a claim against both the Director and the Warden. *Gamble v. Estelle*, 554 F.2d 653 (5th Cir. 1977). The court dismissed the case because it found that the Director and Warden were named as parties not for having failed to provide treatment, but based on the theory of *respondeat superior* by virtue of their official capacities. *Id.*, 554 F.2d at 654. In dismissing the case, the court concluded that it could "find no evidence in the record that either exhibited 'deliberate indifference' to Gamble's medical needs by means of interference with the prison doctor's performance or in any other manner which would satisfy the Supreme Court standard." *Id.*

In the instant case, Swift conceded in the lower court that that dismissal was proper as to the two state entities and to Lynaugh in his official capacity. Therefore, the only allegation remaining was against Lynaugh in his individual capacity. However, in view of the fact that Lynaugh would have had no direct personal involvement in the incident of which Swift complains and did not interfere with the performance of medical personnel at Swift's prison unit, dismissal was clearly proper. *Id.*

Moreover, Swift's own allegations defeat a claim for deliberate indifference. Swift's complaint acknowledges that he was seen by medical personnel on May 2, 1992 at 7:30 a.m., and at 7:00 and 7:30 a.m. on May 3, 1992. Pet. App. 7-8. At 5:00 p.m. on that same day, Swift was sent by life flight to John Sealy Hospital in Galveston, Texas. Pet. App. 8. Swift alleges that the failure of unnamed medical personnel to render a "reasonable examination" caused his condition to worsen. Pet. App. 7. However, "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Estelle*, 429 U.S. at 105-06. As the magistrate judge correctly noted, "despite peppering the allegations in the complaint with the buzzwords of 'deliberate indifference', the complaint, when reduced to is simplest terms, alleges nothing more than negligence, failing to state a claim under 42 U.S.C. § 1983." Pet. App. 17.

II. The Fifth Circuit's Decision In *Schultea* Avoids A Confrontation Between The Substantive Right Of Qualified Immunity And The Federal Rules Of Civil Procedure.

Swift contends that the dismissal of his petition in the lower court was improper due to a "heightened pleading standard" which the Court of Appeals for the Fifth Circuit has continued to adhere to in spite of the holding of this Court in *Leatherman*. This contention is erroneous. In *Leatherman*, this

Court held that a federal court may not apply a "heightened pleading standard" more stringent than usual pleading requirements in civil rights cases alleging municipal liability under 42 U.S.C. § 1983. *Id.*, 507 U.S. at 167. However, in doing so, it expressly reserved consideration on the issue of whether "our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* 507 U.S. at 166-67. Thus, the holding of *Leatherman* is applicable only to civil rights cases alleging municipal liability under § 1983.

Swift also argues that "the lower court should have awaited to resolve the case upon summary judgment or trial after an adequate period for discovery had elapsed." Brief at 11. However, such an argument is in direct conflict with the decision enunciated by this Court in *Harlow v. Fitzgerald* in which it redefined qualified immunity for government officials. *Harlow v. Fitzgerald*, 457 U.S. at 817. In doing so, the Court rejected the subjective element of the good faith defense which had been adopted in *Wood v. Strickland*, 420 U.S. 308, 321 (1975), finding that it "frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." *Harlow*, 457 U.S. at 817. Reasoning that the litigation of the subjective good faith element had proven to involve substantial and unnecessary costs, this Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (citations omitted). This Court explained that this new standard should "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* Since the decision in *Harlow*, the courts have struggled with the "demands qualified immunity now makes upon the Civil Rules and, in particular, the Rules' preference for discovery over pleading." *Schultea v. Wood*, 47 F.3d at 1431. The instant case is illustrative of this struggle.

In *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), the Fifth Circuit persuasively addressed the issues a trial court must face when confronted with an immunity defense. Acknowledging that discovery would "defeat and frustrate the function and purpose of the absolute and qualified immunity ostensibly conferred on the official," the court stated that a judge may not face an immunity case "as just another lawsuit in which the notice pleading's liberal policy of F.R.Civ.P. 8 counts on pretrial discovery to ascertain the factual basis for the claims, and as here, a defense. *Id.* at 1478. Mindful of the fact that the "public goals sought by official immunity are not procedural," but "go to very fundamental substantive objectives," the court recognized that a trial court "must find a way to adapt its procedures to assure full effectuation of this substantive right, since the Enabling Act provides that the rules shall not abridge, enlarge or modify and substantive right." *Id.* at 1479 (citations omitted).[2]

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[2] Justice Kennedy in his concurring opinion in *Seigert* expressly embraced the use of heightened pleading to accommodate the substantive defense of qualified immunity.

> The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Seigert, 500 U.S. at 235 (Kennedy, J., concurring).

Judge Jones, in her concurrence in *Schultea* also found that the "substantive immunity afforded public officials to free them from the burdens of litigation cannot be abrogated by a rule of civil procedure. . . To the extent of any conflict, Rules 8 and 9(b) must yield to vindication of the defense of immunity." *Schultea*, 47 F.3d at 1436 (Jones, J., concurring).

Placing the burden of determining whether a viable immunity defense has been presented "squarely on the judge," the court enumerated certain procedural "tools" that could be used; namely newly-amended Rules 11 and 16 of the Federal Rules of Civil Procedure, as well as a Rule 12(e) motion for more definite statement. *Id.* at 1480, 1481, 1482 n 25. It relied in particular on the stringent requirements of Rule 11, which require a plaintiff's attorney to affirm that, after making reasonable inquiry, "he believes in good faith that the defendant official cannot successfully show he has the defense of immunity. This means also that having that good faith belief, he is able to state with some particularity what those facts are." *Id.* at 1481-82. Thus, the *Elliott* court required a plaintiff to anticipate an immunity defense in his petition.

Subsequent to *Elliott*, the decision in *Leatherman* was reached. As stated in *Leatherman*, the issue of whether "our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials" was expressly reserved. *Leatherman*, 507 U.S. at 166-67. This Court also noted that "[w]e think it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit *in this case* with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.*, 507 U.S. at 168 (emphasis added). Swift contends that the Fifth Circuit has ignored this holding in *Leatherman*. However, the language used by this Court makes it clear that the language regarding a conflict between the heightened pleading standard and the Federal Rules of Civil Procedure was confined to the fact situation presented in *Leatherman*. Even assuming, *arguendo*, that Swift's contention is correct, the Fifth Circuit in *Schultea* re-examined *Elliott* in light of the continued evolution of qualified immunity and, in doing so, found the means to avoid this predicament.

Writing for the majority, Judge Higginbotham emphasized that "[t]he confrontation we saw in 1984 [in *Elliott*] is not the confrontation today." *Schultea*, 47 F.3d at 1434.

Once again, the court employed the same approach it had in *Elliott*, and utilized procedural tools to "assure full effectuation of this substantive right." *Elliott*, 751 F.2d at 1479. While maintaining its requirement that "complaints plead more than conclusions," the court no longer insisted that a plaintiff fully anticipate the defense in his complaint at the risk of a dismissal under Rule 12. The court turned to Rule 7 of the Federal Rules of Civil Procedure, which allows a district court to require a plaintiff to reply in detail and with particularity to a defendant's motion to dismiss on qualified immunity grounds. *Schultea*, 47 F.3d at 1433.

> First, the district court must insist that a plaintiff suing a public official under § 1983 file a short and plain statement of his complaint, a statement that rests on more than conclusions alone. Second, the court may, in its discretion, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity. Vindicating the immunity doctrine will ordinarily require such a reply, and a district court's discretion not to do so is narrow indeed when greater detail might assist. The district court may ban discovery at this threshold pleading stage and may limit any necessary discovery to the defense of qualified immunity. The district court need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts. Even if such limited discovery is allowed, at its end, the court can again determine whether the case can proceed and consider any motions for summary judgment under Rule 56.

Id. at 1433-34.

Thus, Swift is clearly in error when he contends that the decision reached by the court in *Schultea* ignores the reasoning of *Leatherman*. By using Rule 7 and avoiding the use of Rule 9's particularity requirements, the court was able to circumvent the dilemma identified in *Leatherman*. Thus, it did not address the issue of whether "the substantive right of qualified immunity supplants the Federal Rule's scheme of pleading by short and plain statement." *Id.* at 1433. "The ultimate outcome of a confrontation between Rule 9(b) and qualified immunity, we no longer need to decide and we do not." *Id.* at 1434.

III. Broad Ranging Discovery Is Not Favored in Qualified Immunity Suits

Finally, Swift's argument that the lower court should have allowed discovery is not in accordance with this Court's decisions. As already noted, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 817 (citations omitted). The question of qualified immunity arose subsequent to *Harlow* in *Anderson v. Creighton*, 483 U.S. 635 (1987). Noting that "[o]ne of the purposes of the Harlow qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government,'" this Court emphasized that "qualified immunity questions should be resolved at the earliest possible stage of a litigation," and, if discovery is found to be necessary, it "should be tailored specifically to the question of [defendant's] qualified immunity." *Id*, 483 U.S. at 646 n. 6 (citations omitted).

This court subsequently granted certiorari in *Seigert v. Gilley*, 500 U.S. at 231, in order to "clarify the analytical structure under which a claim of qualified immunity should be addressed." In so doing, it once again emphasized the message of *Harlow* that "[u]ntil this *threshold* immunity question is

resolved, discovery should not be allowed." *Id.* In order for a judge to resolve this question , he must determine both what the currently applicable law is and whether the constitutional right asserted by a plaintiff is "clearly established" when the event occurred. *Id.* "Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Id.*

Swift was given an opportunity by the court to engage in discovery concerning the question of qualified immunity, but declined to do so. App. A-3. It appears that Swift wanted to conduct "broad-ranging" discovery prior to the qualified immunity question being resolved. However, as already discussed, this is contrary to the holdings of this Court. Accordingly, Swift's contention in this regard is without merit

Conclusion

For the reasons set forth above, the Respondents herein submit that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

HAROLD J. SWIFT,	§	C.A. No. G-93-220
Plaintiff,	§	
v.	§	GALVESTON, TEXAS
	§	SEPTEMBER 2, 1993
TEXAS DEPARTMENT	§	
CRIMINAL JUSTICE,	§	
INSTITUTIONAL	§	
DIVISION, ET AL.,	§	
**********		9:00 A.M.

TRANSCRIPT OF RULE 16 CONFERENCE
BEFORE THE HONORABLE SAMUEL B. KENT

APPEARANCES:

FOR THE PLAINTIFF: Mr. Robert McKissick
Spagnoletti & Associates
1600 Smith
Suite 4545
Houston, Texas 77002

FOR THE DEFENDANTS: Ms. Susan Elizabeth Werner
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COURT REPORTER: Kathy L. Metzger
U.S. Courthouse
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE COURT: The next case is G-93-220, Harold Swift versus T.D.C.

Who's here for the plaintiff?

MR. MCKISSICK: Bob McKissick, Your Honor.

THE COURT: Hello, Mr. McKissick.

MR. MCKISSICK: How are you, sir?

THE COURT: It's nice to see you, sir.

MR. MCKISSICK: It's good to see you, Judge.

THE COURT: Are you here for the --

MR. MCKISSICK: For Mr. Spagnoletti.

THE COURT: All right. And who's here for the Defendant?

MS. WERNER: Susan Werner, Your Honor.

THE COURT: Let me ask y'all a stupid question. What is this doing on a regular Rule 16? Is this guy incarcerated, or what's the deal?

MR. MCKISSICK: Yes, sir. The plaintiff is a prisoner with the Texas Department of Corrections and this is essentially a proper medical care suit.

THE COURT: All right. So he survived his Spears hearing and all --

MR. MCKISSICK: Yes. sir.

MS. WERNER: No, Your Honor, he hasn't had a Spears hearing. A Spears hearing is when they're pro se and the judge has an evidentiary hearing.

MR. MCKISSICK: Oh, no. This is a civil action against the state for injuries to the prisoner while being incarcerated by the State of Texas. It's a minimal malpractice case, Judge. They didn't give him proper medical care, and he is in a wheelchair where he wasn't before.

THE COURT: All right. And I assume you're going to assert immunity defenses?

MS. WERNER: Eleventh Amendment as well as qualified.

THE COURT: All right. Well, all I can do today is give you a very tight time frame for discovery relative only to immunity issues and y'all go ahead -- and I'll give you a briefing timetable for that. I'll rule on it. And one side or the other is going to take it up to the Circuit anyway.

Let me ask that -- I'm going to limit discovery to 45 days. I want discovery completed, please, by October the 15th. And this will be limited only to issues having to do with qualified or absolute immunity.

MR. MCKISSICK: Yes, sir.

MS. WERNER: We don't even have qualified as an issue at this point, Your Honor. It's just Eleventh Amendment and sovereign immunity.

THE COURT: All right. Well, y'all get together with that and just -- and what I'm looking for is only that information that's relative to the assertions of immunity defenses.

MR. MCKISSICK: All right, sir.

THE COURT: And let me ask for dispositive motions on immunity issues by -- can you get those done in two weeks after close of discovery?

MS. WERNER: Your Honor, I'll try and do it within the next two weeks and perhaps stall the discovery.

THE COURT: All right. Well, let me do this, I'm going to set a deadline of October the 29th for that briefing. By all means, if you can do it sooner than that, that will be great; but I will indicate dispositive motions by the latest, October 29th. And I want a response by November the 12th or two weeks after submission of motion, whichever is earlier. In other words, if she can get it done in two weeks y'all whip yours out and let's get done with this.

MR. MCKISSICK: Yes, sir.

THE COURT: And then when you file a reply, reply only, no response to the reply will be required nor permitted. And when the reply is filed, please call my case manager and let her know that the motions are ripe for consideration and I will do my best on that just as quickly as we can and get y'all started on your way to the Circuit.

MR. MCKISSICK: All right, sir.

THE COURT: And is there anything else that we can address for the plaintiff today?

MR. MCKISSICK: I don't believe so, Your Honor.

THE COURT: All right. And for the Defendant?

MS. WERNER: No, Your Honor.

THE COURT: All right. Well, thanks. It's nice to have down here. I'm sorry to bring you here for this seemingly short presentation, but that's the best we can do.

MS. WERNER: My apologies for not doing my motion prior to.

THE COURT: Well, all right. Thank you-all very much. It's nice to see you.

MR. MCKISSICK: Thank you, Your Honor.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled cause.

/s/_____ 3/17/95

Kathy L. Metzger — Date

Official Court Reporter